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SUPREME COURT NO. 94902-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ANTHONY GENE HAND, Petitioner

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AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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## I. ISSUE FOR REVIEW

An incompetent criminal defendant has a liberty interest in receiving timely competency restoration treatment. A 61-day delay in admission for treatment is a violation of substantive due process guaranteed under the Fourteenth Amendment to the U.S. Constitution. What is the remedy where the trial court imposed a no bail hold, and declined to follow the statutory remedy of dismissal without prejudice?

## II. LEGAL AUTHORITY AND ARGUMENT

The Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial... “[it] is fundamental to an adversary system of justice”. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), RCW 10.77.050. Under Washington law, if a criminal defendant is determined to be incompetent to proceed to trial, the court must commit him to a facility for competency restoration. RCW 10.77.086(1)(a)(i)(ii)(b).

Constitutional questions which arise regarding the circumstances of an incompetent pretrial detainee are addressed under the Due Process

Clause of the Fourteenth Amendment<sup>1</sup>. *Trueblood v. Washington Dept. of Social and Health Services*, 822 F.3d 1037 (2016); *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1120 (9<sup>th</sup> Cir. 2003).

The question here, as in *Mink* and *Trueblood*, is “What happens when the state mental hospital...which is charged with evaluating and treating mentally incapacitated defendants, refuses to accept such defendants on a timely basis?” *Trueblood v. Washington Dept. of Soc. & Health Servs.(Trueblood I)*, 73 F. Supp. 3d 1311, 1315-17 (W.D. Wash. 2014); *Mink*, 322 F.3d at 1105.

The answer is simple: an incompetent pretrial detainee cannot be jailed indefinitely simply because there is no room for him in the state hospital. *Mink*, 322 F.3d at 1122. Incompetent detainees have a distinct “liberty interest [i]n freedom from incarceration” so they can receive restorative treatment. *Mink*, 322 F.3d at 1121. The state has no legitimate interest in keeping incompetent defendants “locked up in county jails for weeks or months” following an incompetency determination. *Trueblood*, 822 F.3d at 1044. Jails are not hospitals.

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<sup>1</sup> In *Trueblood* the Court joined her sister courts and held that competency related delays are not relevant to the speedy trial inquiry. It rejected the state’s argument that the Sixth Amendment, not the due process clause, provides the framework for analysis. *Trueblood*, 822 F.3d 1044, 1046 fn. 5.

In *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), the Supreme Court found a constitutional defect in Indiana's treatment of an incompetent criminal defendant. By the time the Supreme Court heard the case, Jackson had already been held for 3 ½ years. The Court found there was no reasonable relationship between the terms of his confinement and its purpose. The Court held that not only must the means and purpose be related, but there was a quid pro quo: the defendant must receive some treatment benefit in return for his loss of liberty. *Jackson*, 406 U.S.at 738. The 1972 *Jackson* Court stated, "In light of differing state facilities and procedures and a lack of evidence in this record, we do not think it appropriate for us to attempt to prescribe arbitrary time limits." *Id.*

In 2014, the *Trueblood* Court, looking at Washington State laws and practices, found "the state has consistently and over a long period of time violated the constitutional rights of the mentally ill - this must stop. The Court finds that the defendant's failure to provide timely competency evaluation and restoration to Plaintiffs and class members has caused them to languish in city and county jail for prolonged periods of time, and that this failure violates their right to substantive due process under the Fourteenth Amendment." *Trueblood*, 73 F. Supp. 3d at 1317-18.

The following year the same court noted "Defendants [DSHS] have demonstrated a consistent pattern of intentionally disregarding court

orders...and have established a de facto policy of ignoring court orders which conflict with their internal policies.” *Trueblood v. Washington State Dept. of Social & Health Services*, 101 F.Supp.3d 1010, 1024, (2015) (remanded on other grounds). The court required monthly and quarterly reports to monitor progress and demonstrate a long-term plan for compliance with the order of the court. *Id.* at 1025. The court set a seven-day time frame for an in-jail competency evaluation and a seven-day period within which DSHS must admit persons to receive court ordered competency restoration services. *Id.* at 1024. In a challenge to the court order, the state did *not* appeal the seven-day time limit for admission for restoration services. *Trueblood*, 822 F.3d at 1042.

The Washington State legislature responded with RCW 10.77.068, which set performance targets and maximum limits for the timeliness of evaluations and admissions. [2015 c5 § 1]. The statute set a performance target of seven days or less and a maximum time limit of fourteen days for an offer of admission to a state hospital to a defendant in pretrial custody. RCW 10.77.068(1)(a)(ii)(A)(B). The statute provides numerous defenses to allegations of failure to perform in the timely manner, which include demonstrating by a preponderance of the evidence that the reason for exceeding the time limits was outside the department’s control: “An unusual spike in the receipt of evaluation referrals or in the number of



defendants requiring restoration services has occurred, causing temporary delays until the unexpected excess demand for competency services can be resolved.”

A lack of funds, staff, facilities, or resources does not justify a failure to protect the constitutionally guaranteed substantive due process rights of incompetent criminal defendants. *Trueblood*, 73 F. Supp.3d at 1314 (*quoting Mink*, 322 F.3d at 1121). “Washington cannot legislate its way out of the Constitution based on lack of funding or facilities.” *Willis v. Washington State Dept. of Social and Health Services*, No. C16-5113, 2017 WL 1064390 at \*6 (W.D. Wash. March 21, 2017) (court order).

Imposition of financial sanctions by the courts has not spurred the legislature or DSHS to remedy the violation of substantive due process rights of incompetent criminal defendants. As stated by Justice Sanders in a concurrence opinion:

The judiciary should accept no shortcuts when it comes to discharging its constitutional obligation to appoint effective attorneys to represent indigent criminal defendants. If no such attorney is to be found because adequate funding is not available, then no attorney should be appointed and the case dismissed. It is not up to the judiciary to tax or appropriate funds; these are legislative decisions.

*State v. A.N.J.*, 168 Wn.2d 91, 121, 225 P.3d 956 (2010).

## REMEDY

What remains to be determined is the judicial remedy for the violation of substantive due process rights. Under RCW 10.77.084(1)(c)<sup>2</sup>, the trial court is authorized to dismiss the criminal proceedings without prejudice if competency has not been restored within the statutory time limits of a 45 or 90-day treatment period. Division I of the Court of Appeals affirmed the trial court in ordering the dismissal of the criminal charge without prejudice, after the Western State Hospital repeatedly ignored court orders to admit the defendant to a 90 day stay for restoration services. *State v. Kidder*, 197 Wn.App. 292, 389 P.3d 664 (2016). The trial court dismissed and ordered an evaluation under RCW 71.05. *Id.* at 310.

By contrast, in Mr. Hand's case, the trial court found there was no substantive due process violation and declined to dismiss without prejudice. Thus, Mr. Hand remained in the jail, on a no bail hold, without

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<sup>2</sup> (c) If, following notice and hearing or entry of an agreed order under (b) of this subsection, the court finds that competency has been restored, the court shall lift the stay entered under (a) of this subsection. If the court finds that competency has not been restored, the court shall dismiss the proceedings without prejudice, except that the court may order a further period of competency restoration treatment if it finds that further treatment within the time limits established by RCW 10.77.086 or 10.77.088 is likely to restore competency, and a further period of treatment is allowed under RCW 10.77.086 or 10.77.088.

treatment long *after* the 45 day treatment period had expired. The time for this remedy has passed.

Substantive due process prohibits the government from interfering with a fundamental right unless the infringement is narrowly tailored to serve a compelling state interest. *In re Det. Of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). Liberty is a fundamental right. An incompetent criminal defendant has a liberty interest in receiving timely competency restoration treatment. *Trueblood*, 822 F.3d 1037. Here, the state had two interests: to restore Mr. Hand to competency, and to resume criminal proceedings. *Mink*, 322 F.3d at 1122. There was no legitimate state interest in continued confinement of Mr. Hand without treatment. Nor was there any state interest in confining Mr. Hand without treatment when he had access to Medicaid and knew how to get treatment for himself<sup>3</sup>. Where the nature of the confinement and the duration of the confinement bear no reasonable relation to the purpose for which he was held, there must be a remedy. *Jackson*, 406 U.S. 733; Const. art. 1§3; U.S. Const. amend. XIV.

The serious relief of dismissal with prejudice matches the failure of the state to provide competency restoration services in a reasonable time.

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<sup>3</sup> Mr. Hand had no history of committing violent crimes. CP 509-510.

“Extended detention implicates due process rights because “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg v. Romero*, 457 U.S. 307, 321-22, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). “That incompetent detainees might have the hope that they will at some unidentifiable point in the future be transferred from jail to a mental health facility in compliance with court order does not mean that their continued, lengthy imprisonment is non-punitive.” *Advocacy Center for Elderly and Disabled v. Louisiana Dept. of Health and Hosp.* 731 F.Supp. 2d 603, 623-24 (E.D. La. August 9, 2010).

Like Mr. Hand, the presumed innocent, incompetent criminal defendant has borne the burden of the state’s continued disregard of court orders for timely services, and the failure of the legislature to adequately fund treatment facilities. Financial sanctions have not spurred change.

If having insufficient resources justifies delay, it appears there will always be delay. “Across the nation, a growing number of defendants judged incompetent to proceed (ITP) to trial are unable to access needed mental health care because of critical shortages of state hospital psychiatric beds and funding. Many of these patients languish in jails and prisons that lack the resources to provide adequate care during their

prolonged wait for treatment.”. *Atayde v. Napa State Hosp.*, 255 F. Supp. 3d 978, 992 (E.D. Cal. 2017) (quoting, Hal Wortzel et al., *Crisis in the Treatment of Incompetence to Proceed to Trial: Harbinger of a Systemic Illness*, J. Am. Academy of Psychiatry & L., 257–263 (2007)).

It is the province and duty of the judiciary to say what the law is, even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch. *Marbury v. Madison*, 5 U.S. 91 Cranch 137, 176, 2 L.Ed. 60 (1803). Mr. Hand respectfully asks this Court to consider the crushing burden placed on incompetent criminal defendants as they await mental health treatment in jails, which violates their constitutional substantive due process rights and establish dismissal with prejudice as the remedy.

### III. CONCLUSION

For the foregoing reasons, Mr. Hand respectfully asks this Court to order the remedy of dismissal with prejudice.

Submitted this 17<sup>th</sup> day of January 2018.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Anthony G. Hand, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Amended Supplemental Brief was sent by first class mail, postage prepaid on January 17, 2018 to

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And by electronic service by prior agreement between the parties to:

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